Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

v.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

No. 505.

Appeal from the Circuit Court of the United States for the Northern District of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

I.

This is a general appeal allowed by the Circuit Court. Appellee prints only the assignment of errors and thereon prays dismissal. But such assignment distinctly asserts that the case presents and involves the "construction or "application" of the Federal Constitution—Article III, which extends the judicial power to controversies "be- "tween citizens of different States," and that the true construction and application of such provision excludes

this case therefrom, as will appear from the bill and other pleadings, and the evidence as found in the record. Errors 1–18.

The question thus presented can only be properly heard and determined on inspection of the record or such relevant portions thereof as the appellants must print, and with fair opportunity for argument therefrom.

Manifestly allowance of such general appeal and distinct assertion of the existence of such constitutional questions does not justify dismissal on a mere brief of counsel which refers the Court to sundry opinions of the Circuit Court, and *assumes* the case presented by such appeal.

When all questions involving the construction or application of the Constitution are by existing law left to this Court as the sole reviewing tribunal, litigants should not be thus summarily dismissed, and upon the mere assumption that errors so broadly assigned and presented in a case of this magnitude and importance are without *any* foundation. The appeal is given by law as matter of *right*, and has been so allowed by the Court below. Hearing as matter of right is equally contemplated by the law and is not properly to be limited solely to a brief in support of or in opposition to a motion to dismiss, without a single page of the record made in the Court below spread before the Court for its inspection or information, and in a case where a large part of a voluminous record is essential to be so printed and presented in the proper determination of the questions involved in the appeal.

II.

Some of the errors assigned, Nos. 19–25, assert that by the pleadings and evidence it is shown that named parties

were improperly made defendants when properly complainants, and that this was done to create an apparent case of diverse citizenship cognizable in a Federal Court. And ignoring the specific preceding 18 errors assigned, wherein it is distinctly alleged that, as appears by the bill and the pleadings and evidence, the suit involved the construction and application of that provision of the Constitution which provides that the Federal judicial power shall extend to controversies between citizens of different States, counsel plant their *entire* argument on the assigned errors 19–25, and assume these to present the entire case, although no part of the record is presented whereby to determine the correctness or incorrectness of that assumption.

III.

By the Constitution, Art. III, Federal judicial power extends "to controversies," *inter alia*, "between citizens "of different States." Exercise thereof is vested in one Supreme Court and such inferior Courts as Congress may establish. The distribution of the power (except in cases of original cognizance in this Court) rests in legislative control, but the power *itself* is limited to the cases and controversies expressly defined in the Constitution. It cannot be enlarged by legislation. The limitation is always present, and is fundamental.

Though the Constitution does not in terms extend the judicial power to all controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject. It is therefore a question of construction whether the controversy in a given case is within the grant of judicial power..

Rhode Island v. *Massachusetts*, 12 Pet. 657, 721.

As this is true of States, it must be equally true of individuals. The language of the Constitution in respect to *each* grant of judicial power—States or individuals—is identical.

But the Act of March 3, 1891 (26 Stats. 826, Sec. 5), extends to this Court the power of review by appeal or writ of error from the Circuit Court "in any case that "involves the construction or application of the Constitu- "tion of the United States." This provision is manifestly broader in scope and meaning than the word "construc- "tion" alone. It was inserted *ex industria*, and the word "application" must be extended to cases not involving the "construction" of the Constitution, for the disjunctive "or" has not here the same meaning as the conjunctive "and."

What is its meaning?

The distinction is manifest. Cases involve the "con- "struction" of the Constitution when some provision of that instrument itself is presented for *interpretation*. Other and distinct cases involve the "application" of the Constitution upon some provision of that instrument whose interpretation or construction is not presented or in doubt, or has been judicially settled. The inquiry then extends only to the "application" of such pre-determined provision to the case in hand.

To illustrate. If by decision of this Court some provision of the Constitution is *construed*, and its meaning thereby determined, the effect of *that* provision where pleaded in a subsequent case extends to the determination of its "application" or "non-application" to such case. *Such* a case is within the clear appellate jurisdiction of this Court under the Act of 1891.

To illustrate by the case at bar.

The judicial power is extended by the Constitution to

" controversies" * * * " between citizens of different " States." The question may arise, " What is a contro- " versy?" and its determination would involve " construc- " tion " of the Constitution. That being determined, some other and later case may involve the " application " of this settled provision to the facts and circumstances of *that* case, whereby it would be determined that it was or was not a case of Federal cognizance.

Again, and as the record in this case will disclose, certain parties hold title as mere *trustees* The beneficiaries thereunder are named in the instru nts of trust; they appear as actors in the litigation. s the question of diverse citizenship under such record conditions to be determined by the citizenshipof trustees or beneficiaries in upholding or denying the jurisdiction of a Federal Court? This may involve both " construction " and " application " of the Federal Constitution. Can these questions be determined solely on counsel's brief on a motion to dismiss as is here asked? The determination of *such* questions involve the highest elements of jurisdiction conferred upon this tribunal of last resort. Manifestly such weighty matters cannot be " whistled down the wind " in the absence of the record, and in face of a general appeal allowed on full hearing by a Federal judge.

IV.

Counsel err in assuming that because the Circuit Court derive their jurisdiction *immediately* from acts of the Congress such acts *alone* measure and define the extent of their powers and jurisdiction. That is true in all cases where parties or subject-matter are within the jurisdiction so conferred. But it is equally true that where existence of parties or subject-matter is *denied*, whereon alone the

statute can operate, resort must be had to the origin of all Federal judicial power—the Constitution itself. That is the ground of appeal in present case. In all the cases cited there was no *denial* of diverse citizenship; the point made was that the party claiming the right to sue in a Federal Court because of diverse citizenship or otherwise did not possess the *right*—as, for instance, that as the holder of a promissory note or chose in action *he* could not so sue, because his assignor did not possess such diverse citizenship, or that the transfer was not *bona fide* and the Federal *statute* did not therefore confer the right on the assignee, &c. Manifestly the cases cited do not here apply, because while diverse citizenship is not here denied, yet a ground of appeal *inter alia* is that, as shown by the pleadings and proof, there is no *controversy* between citizens of different States whereby any Federal judicial power can be lawfully exercised. The distinction is obvious and controlling.

V.

The assumption of counsel in entire absence of the printed record that the *only* question on this appeal is one of statutory jurisdiction under claim of diverse citizenship is followed by the suggestion that any jurisdiction so exercised here, on pending appeal, would be in derogation of the power of *final* review vested in the Circuit Courts of Appeals in all cases in which the jurisdiction is dependent "*entirely* upon the opposite "parties to the suit or controversy being aliens and "citizens of the United States or citizens of different "States."

But in this we think counsel are clearly in error. The jurisdiction of the Circuit Court of Appeals is upon the

merits alone, and in a case where the jurisdiction of the Circuit Court is *unchallenged* because of diverse citizenship. All questions of *jurisdiction* of the Circuit Court are reviewable only in *this* Court. Such is the language and intention of the Act of 1891, and it is so applied.

United States v. *Jahn*, 155 U. S. 109, 115.

Furthermore, the operation of that provision of the Act of 1891 which gives an appeal or writ of error to *this* Court in cases involving the jurisdiction of the Circuit Court is *not* the exclusive manner in which jurisdictional questions may here arise. There are many cases wherein by defective service of process or other questions of mere practice or non-existence of jurisdictional amount in controversy the jurisdiction of the Circuit Court is challenged, as illustrated by the case of—

Mexican Central Ry v. *Pinckney*, 149 U. S. 194.

In *such* cases the jurisdiction here can and does well depend solely on proper certification of the question from the Circuit Court. They are the precise *class* of cases wherein the jurisdiction of the Court below must be tested by statute—either the Act of Congress creating or defining the powers of the Court, or the application of the provisions of State law and practice. *But they are not exclusive.* Other cases can and do arise wherein the "construction or application" of the Constitution is directly involved as the primary source of *any* jurisdiction and the foundation for the exercise or non-exercise of any Federal judiciary powers. In *such* cases the jurisdiction here is invoked by general appeal, precisely as in the case at bar. The questions which may and do arise in such instances are not measured by certificates, but stand upon the *record*, to which the Court must have necessary and

full access to fully and properly hear and determine such appeal.

VI.

Chappell v. *United States*, 166 U. S. 499, is in point, and is conclusive on pending motion. That was a condemnation proceeding brought in an U. S. District Court. The *defendant*, by exception to the inquisition, urged (1) that the statute under which the proceeding was brought was unconstitutional; (2) the officer bringing the same was without authority so to do; and (3) the Court was without jurisdiction over the subject-matter. Thereon the Court held:

"But no question of jurisdiction having been sepa-
" rately certified or specified, and the writ of error hav-
" ing been allowed without restriction or qualification,
" this Court, under the other clause of the statute above
" cited, has appellate jurisdiction of this case as one in
" which the constitutionality of a law of the United States
" was drawn in question; and, having acquired jurisdic-
" tion under this clause, has the power to dispose not
" only of the constitutional question, but of the entire
" case, including all questions whether of jurisdiction or
" of merits."

And which the Court proceeded to do.

The same rule is affirmed in—

Homer v. *U. S.*, 143 U. S. 570.

Scott v. *McDonald*, 165 U. S. 58, 71.

So the present appeal in the case at bar has been allowed "without restriction or qualification," and the assignment of errors avers that by the bill, pleadings an evidence a question involving the "construction or appli-
" cation" of the Federal Constitution is raised. On *that*

question appellants should as of right enjoy the opportunity to be heard upon the *record*, and not upon a brief in support of a motion to dismiss their appeal.

The case of *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, is cited as if conclusive in sustaining present motion. We submit it has no such effect.

There the plaintiff in the Circuit Court sought review in this Court of adverse judgment there rendered, his only ground of Federal jurisdiction affirmatively set up by him *or appearing in the case* being diverse citizenship. But the case does *not* hold that the "construction or applica-"tion" of the Constitution must be there raised by plaintiff *alone* in order to vest this Court with jurisdiction to hear and determine on appeal. *Contra* the opinion cites the former case of *Ansbro* v. *United States*, 159 U. S. 695, and *Green* v. *Cornell*, 163 U. S. 75, in which the *reverse* of that assumption is distinctly ruled.

Thus Ansbro as *defendant* brought the case here by writ of error, and after argument and examination of the whole record, this Court said (p. 697):

"A case may be said to involve the construction or ap-"plication of the Constitution of the United States "when a title, right, privilege or immunity is claimed "under that instrument, but a definite issue in respect of "the possession of the right must be distinctly deducible "*from the record* before the judgment of the Court below "can be revised on the ground of error in the disposal of "such a claim by its decision. And it is only when the "constitutionality of a law of the United States is drawn "in question, not incidentally, but necessarily and directly, "that our jurisdiction can be invoked for that reason. "*Borgmeyer* v. *Idler*, 159 U. S. 408; *Carey* v. *Railway* "*Company*, 150 U. S. 170; *In re Lennon*, 150 U. S. 395; "*Northern Pacific Railroad Company* v. *Amato*, 144 U. "S. 465, 472; *Sayward* v. *Denny*, 158 U. S. 180. An as-

" signment of errors cannot be availed of to import ques-
" tions into a cause which the record does not show were
" raised in the Court below, and rulings asked thereon, so
" as to give jurisdiction to this Court under the fifth sec-
" tion of the act of March 3, 1891."

So in the case of *Cornell* v. *Green*, 163 U. S. 75, likewise fully argued to and considered by the Court on the whole record, the Opinion at p. 79 recites :

" The Constitution of the United States is not men-
" tioned in the bill of Cornell, *or in the demurrer of the*
" *defendant*, or in the decree and opinion of the Court.
" The case appears to have been treated throughout as
" depending upon a question of chancery practice, not of
" constitutional right. The first indication of anything
" like an intention on the part of the plaintiff to invoke
" the protection of the Constitution of the United States
" is in the suggestion, in the assignment of errors, ' that
" ' said finding deprived said complainant of his property
" ' without due process of law.' "

And the opinion then concludes by giving the quotation, *supra*, from the case of *Ansbro* v. *United States*.

See also—

Chicago, Burlington &c. Rd. v. *Chicago*, 166 U. S. 226, 231.

And in all the cases cited it is significant to note that the Court heard and decided the question from the *record*, and after full argument. These appellants ask the same right, while opposing counsel ask dismissal upon their mere brief, without laying before the Court a single page of the record on which this appeal has been " allowed " without restriction or qualification." *Chappell* v. *United States, supra.*

When the record in this cause is properly laid before

the Court it will abundantly verify the correctness of the assignment of errors in showing that the question of the "construction or application" of the Federal Constitution in respect to "controversies" "between citizens of different States" was properly and distinctly raised thereby, and was so understood and expressly ruled upon as such by the Circuit Court. It is therefore directly involved by the pending appeal.

If appellants are, on proper hearing upon the *record*, able to sustain their views of the question thus involved, this Court has repeatedly declared its duty in respect to both its action and that of the Circuit Court.

Morris v. *Gilmer*, 129 U. S. 315, 325.
Chapman v. *Barney*, ib. 677, 681.
Peper v. *Fordyce*, 119 U. S. 469, 471.

And the duty of the Circuit Court to so ascertain and determine its powers *without* suggestion or plea is equally well settled.

Morris v. *Gilmer*, *supra*, 326.
Blacklock v. *Small*, 127 U. S. 96, 105.

VII.

Reference is made by counsel to a former appeal herein dismissed at the last term because of a defective certificate. That appeal was based upon certificate only—and was addressed to the special point of jurisdiction covered thereby. It has been dismissed. Such dismissal is not a bar, and does not preclude consideration of the pending general appeal "allowed without restriction or qualification," and on which the appellants ask the right to be heard and as the law of the land provides. No conclusion

or argument to appellants' prejudice can be drawn from the dismissal of the former appeal.

Such appeal did not raise the proposition covered by the pending appeal, and the dismissal of the former appeal must be governed solely by the reasons given therefor.

Davidson v. *New Orleans*, 96 U. S. 104.
Schunk v. *Moline & Co.*, 147 U. S. 503.
Horner v. *U. S.*, 143 U. S. 577.
Scott v. *McDonald*, 165 U. S. 71, 73.

We submit, appellants are entitled to be heard *on the record*, in support of their general appeal, and that the motion to dismiss should be denied.

Respectfully submitted

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellants.

ADDENDA.

As inspection of the record will show, the existence of a controversy "between citizens of different States" was strenuously denied in the Circuit Court and was expressly ruled. This contention must be determined by and from the Federal Constitution. The statute conferring jurisdiction upon the Circuit Courts in controversies "between "citizens of different States" simply repeats the language of the Constitution. Hence, and as *distribution* of federal judicial power by the statute is not here involved, but the fundamental construction or application of the Constitution as the source and foundation of *any* jurisdiction herein, the general appeal in this case is not to be tested or determined by the construction of the statute nor controlled by decisions which relate solely to such statute law.

The pleadings, the evidence, and the *law* properly place the beneficiaries designated in the caption of the bill and the trustees (as well as the California beneficiaries in the body of the bill) on one side and the appellants on the other side of the *real* controversy—"arranging the "parties on opposite sides of the real and substantial "dispute," as held in *Blake* v. *McKim*, 103 U. S. 336, 337. So arranged, it is by this record demonstrated that there is no controversy "between citizens of different States," whereby, under the Constitutional grant of federal judicial power, this suit can be heard and determined in a federal Court.

Pacific R.R. v. *Ketchum*, 101 U. S. 289, 299.

And in so doing the Court is but engaged in the continuous duty of determining and applying the fundamental federal law.

Davidson v. *New Orleans*, 96 U. S. 97, 104.

And this duty and this question necessarily involve review in this Court of all the pleadings and the evidence with respect thereto—in short, the *entire* record as far as pertinent. The interests of parties—real and nominal; the consideration of the effect and weight of the testimony thereon, and the application of legal rules thereto, all of which are for the determination of this Court on this appeal, irrespective of the conclusions of the Circuit Court upon either facts or law.

None of these matters are limited or controlled by the federal statute. Congress may distribute but cannot *create* judicial power. That is measured and limited by the Constitution alone, and resort to that instrument in final determination of *this* case is the ground of pending appeal.

To repeat: We insist that the Constitutional judicial power over controversies "between citizens of different "States" does not apply to *this* case, because the citizenship of the trustees, who are shown by the record to have originated and are now maintaining this suit in the names of the complainants, as well as some of the beneficiaries under the trusts, are citizens of the same State (California) as are the adverse defendants and appellants. Such trustees, under the facts disclosed by this record, are indispensable parties.

Peper v. *Fordyce*, 119 U. S. 469.

Kerrison v. *Stewart et al.*, 93 U. S. 155.

The record will further show that appellant, Henry P. Merritt, was not brought into the Circuit Court or made a party to this suit until he had begun an action in the State Superior Court, and then only for the purpose of enjoining such action. His right to maintain that action is secured by the Tenth Amendment of the Federal Con-

stitution. He invoked in vain in the Court below both the "construction or application" of Article III, and the protection given by the Tenth Amendment.

The right of appeal is favored. It is granted in all cases by Article III of the Constitution to *this* Court, with such exceptions only as Congress may prescribe. The legislative exceptions thus authorized should be strictly construed on grounds of public policy and the accepted canons of interpretation, for they obviously stand in derogation of the *general* right so conferred by the Constitution.